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In re Application of : DECISION ON RENEWED
ZABEAU, et al. :
Application No.: 09/011,307 :
PCT No.: PCT/EP96/03480 : PETITION UNDER
Int. Filing Date: 06 August 1996 :
Priority Date: 07 August 1995 : 37 CFR 1.181, 37 CFR 1.137(a)
Attorney Docket No.: 31640-134354 :
For: RESISTANCE AGAINST WILT : AND 37 CFR 1.137(b)
INDUCING FUNGI :
:

This is a decision on applicant's "1. Request For Reconsideration of Denial of Request to Withdraw Holding of Abandonment Based of Failure to Receive a Decision by the PCT Legal Office; 2. Contingent Petition Under 37 CFR 1.137(A) to Revive Unavoidably Abandoned Application; 3) Contingent Petition Under 37 CFR 1.137(B) to Revive Unintentionally Abandoned Application" filed on 05 November 2001 in the United States Patent and Trademark Office (USPTO).

BACKGROUND

On 19 September 2001, applicant was mailed a decision dismissing applicant's petition under 37 CFR 1.181 to withdraw the holding of abandonment for the present application. Applicant was given two months to file and request for reconsideration.

On 05 November 2001, applicant filed the present renewed petition under 37 CFR 1.181, as well as, contingent petitions under 37 CFR 1.137(a) and 37 CFR 1.137(b).

DISCUSSION

A. Renewed Petition Under 37 CFR 1.181

As stated in the previous decision, in the absence of any irregularities there is a strong presumption that the Decision was properly mailed to the address of record and this presumption may be overcome by a showing that the Decision was not in fact received. The showing required to establish the failure to receive an Office action must consist of a statement from the practitioner stating that the Office action was not received by practitioner and attesting to the fact that a

search of the file jacket and docket records indicates that the Office action was not received. A copy of the docket record where the non-received Office action would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement.

Applicant's counsel previously attested that a search of the file jacket and docket records indicated that the Notice was not received and provided a copy of the docket. However, an examination of the evidence provided shows only the docket record for the present application. Applicant was required to provide a copy of counsel's docket records for all applications where the non-received Office action would have been entered.

Applicant's renewed petition under 37 CFR 1.181 is dismissed.

B. Petition Under 37 CFR 1.137(a)

Under 37 CFR 1.137(a), a petition requesting that the application be revived on the grounds of unavoidable delay must be filed promptly after applicant becomes aware of the abandonment, and such petition must be accompanied by: (1) A proper response, unless already filed; (2) The petition fee as set forth in §1.17(l); (3) A showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable; and (4) A terminal disclaimer (if necessary).

With regard to Item (1), the proper response was the transmittal of a supplemental declaration or oath. Applicant filed the declaration on 11 September 2000.

As to Item (2), applicant has authorized the deduction of the \$110.00 petition fee from Deposit Account No. 22-0261.

With regard to Item (4), the terminal disclaimer is not required since this application was filed after 08 June 1995.

As to Item (3), applicant has not provided sufficient evidence to show that the filing of the supplemental declaration on 11 September 2000 was the result of a unavoidable delay. Applicant merely states that the delay was unavoidably caused by non-receipt of the decision mailed 07 May 1999. However, as discussed above, applicant has not shown that the decision was in fact not received. Therefore, if it was received applicant has not provided an explanation as to why the delay in filing the proper reply should be deemed unavoidable.

Applicant's petition under 37 CFR 1.137(a) is dismissed.

C. Petition Under 37 CFR 1.137(b)

A petition under 37 CFR 1.137(b) requesting that the application be revived on the grounds of unintentional abandonment must be accompanied by (1) the required reply, (2) the

petition fee required by law, (3) a statement that the, "entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional" and (4) any terminal disclaimer and fee pursuant to 37 CFR 1.137(c) (where required).

With regard to Item (1), the proper response was the transmittal of a supplemental declaration or oath. Applicant filed the declaration on 11 September 2000.

As to Item (2), applicant has authorized the deduction of the \$1280.00 petition fee from Deposit Account No. 22-0261.

With regard to Item (3), applicant's statement that, "the entire delay in filing the required reply from the due date for filing the reply until the filing of this petition was unintentional." satisfies the requirement of 37 CFR 1.137(b)(3).

As to Item (4), the terminal disclaimer is not required since this application was filed after 08 June 1995.

A review of the application file reveals that, with the filing of the present petition and accompanying papers, a proper response has been submitted and all of the requirements of 37 CFR 1.137(b) for revival have been satisfied and revival is therefore appropriate. Further, a review of the application file reveals that all of the requirements of 35 U.S.C. 371 for entry into the national stage in the United States have been satisfied.

CONCLUSION

Applicant's renewed petition under 37 CFR 1.181 is **DISMISSED**.

Applicant's petition under 37 CFR 1.137(a) is **DISMISSED**.

Applicant's petition under 37 CFR 1.137(b) is **GRANTED**.

As authorized, \$1390.00 will be deducted from Deposit Account No. 22-0261 (\$110.00 as payment of the petition fee for a petition under 37 CFR 1.137(a) and \$1280.00 as payment of the petition fee for a petition under 37 CFR 1.137(b)).

This application will be given an international application filing date of 06 August 1996 and a date of **01 May 1998** under 35 U.S.C. 371.

This application is being returned to the DO/EO/US for processing in accordance with this decision.



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